Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RONALD W. MORTERS,

Petitioner,

v.

CROEN & BARR and AIKEN & SCOPTUR, S.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is a party to litigation in a state court where the issue in dispute is whether or not he has discharged his attorney "for cause" entitled to a trial by jury as a matter of due process under the Fourteenth Amendment and the Seventh Amendment to the Constitution of the United States?

LIST OF PARTIES

RONALD W. MORTERS is the Petitioner.

ANN MARIE MORTERS, AND SHANNON L. MORTERS, A MINOR, BY VINCENT MORTERS AND ROBIN MASLAKOW, HER GENERAL GUARDIANS are Plaintiffs.

CROEN & BARR AND AIKEN & SCOPTUR, S.C., are the Respondents.

JOSEPH R. KUENZLI AND SHILA A. KUENZLI, HUSBAND AND WIFE, USAA CASUALTY INSURANCE COMPANY, A FLORIDA CORPORATION, AND WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION, A WISCONSIN CORPORATION are Defendants.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Ronald W. Morters, respectfully prays that a writ of certiorari issue to review the decision of the Wisconsin Court of Appeals, District II dated May 5, 1999 (unpublished) and the denial of the Petition for Review thereof by the Wisconsin Supreme Court dated July 23, 1999.

OPINIONS BELOW

The decision of the Wisconsin Supreme Court dated July 23, 1999 denying the Petition for Review is reprinted at pp. A-1 to A-2 of the Appendix to this Petition. The opinion of the Wisconsin Court of Appeals, District II dated May 5, 1999 (unpublished) is reprinted at A-3 to A-12 of the Appendix to this Petition.

JURISDICTION

The Wisconsin Supreme Court on July 23, 1999 issued its Order denying the Petition for Review and thereby affirming the decision of the Wisconsin Court of Appeals, District II entered on May 5, 1999. The Jurisdiction of the United States Supreme Court to review the decision of the Wisconsin Supreme Court is found at 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

The case involves the Fourteenth Amendment and the Seventh Amendment to the Constitution of the United States and Section 5, Article I of the Wisconsin Constitution.

STATEMENT OF THE CASE

The petitioner, Ronald W. Morters, was injured in an automobile accident on December 20, 1990. In the accident he sustained serious and permanent injuries. Mr. Morter's wife and granddaughter were also involved in an automobile accident at the same time because they were following his automobile in another automobile. Mr. Morter's automobile was struck by a car coming from the opposite direction and the car then veered off and struck the automobile driven by Mrs. Morters and containing the passenger, their granddaughter, Shannon Morters. The petitioner and his wife and his granddaughter through her guardians hired Attorney Charles H. Barr to pursue their claims against the driver of the striking vehicle and his insurance company. In 1994 petitioner discharged Attorney Barr and hired Attorneys Scoptur and Aiken. Subsequently petitioner discharged Scoptur and Aiken and hired Attorney Willis Zick. The case was resolved by an arbitration award on July 3, 1996. (A-29 – A-32) Attorney Barr filed a Motion to Allocate the Attorneys' Fees on September 26, 1997. (A-39 – A41) Petitioner resisted allocation of any attorneys' fees to Attorney Barr or Attorneys Scoptur and Aiken on the basis that they had been discharged by him "for cause." A hearing on

the matter was held on August 29, 1997 in the Circuit Court of Waukesha County. At the hearing the attorney representing the petitioner demanded a jury trial on the issue of the breach of contract, i.e., whether or not the petitioner had discharged the attorneys "for cause." (A-42 – A-51) The judge denied the demand for a jury trial (A-49), took testimony on the issues and issued Findings of Fact, Conclusions of Law and Order Regarding Enforceability of Fee Agreements and Statutory Liens on September 19, 1997. (A-13 – A-15). Findings of Fact 1 and 2 found that the petitioner "had no just cause to discharge" Attorney Charles H. Barr or Aiken and Scoptur, S.C.

An appeal was timely taken to the Wisconsin Court of Appeals, District II and that Court, by decision of May 5, 1999 (unpublished), held that the petitioner was not entitled to a trial by jury on the issue. (A-3 – A-12) Petition for Review was timely filed with the Wisconsin Supreme Court and the Petition was denied on July 23, 1999. (A-1 – A-2) From that decision the petitioner now requests this Court to grant his Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED BECAUSE THIS CASE AFFORDS THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO DECIDE WHETHER DENIAL OF A JURY TRIAL IN A STATE COURT ON THE FACTUAL ISSUE OF WHETHER OR NOT AN ATTORNEY HAS BREACHED HIS RETAINER CONTRACT WITH A CLIENT IS A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The constitutional floor established by the due process clause of the Fourteenth Amendment to the United States requires a fair trial in a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d (1997). Such a fair trial is a basic requirement of due process. *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555, rehearing denied, 501 U.S. 1777, 112 S.Ct. 28, 115 L.Ed.2d 1109 (1991); *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) and *Wilkins v. Bowerson*, 633 F.Supp. 1496 affirmed 145 F.3d 1006, rehearing and suggestion for rehearing denied (W.D. Mo. 1996).

If a party is denied a jury trial when entitled to it, obviously he is denied a fair trial in a fair tribunal.

Although to date the Seventh Amendment to the United States Constitution has not been incorporated as a matter of due process within the Fourteenth Amendment to the United States Constitution, it is clear from decisions interpreting the Seventh Amendment that the right to a trial by jury is a paramount right in Anglo American Jurisprudence. One Court of Appeals called the right of

trial by jury a "fundamental liberty." *Lecates v. Justice of Peace Court 4 of State of Del.*, 637 F.2d 898 (3rd Cir. 1980). The District Court in New York in 1978 in *Bernstein v. Universal Pictures, Inc.*, 79 FRD 59 stated:

> "The right to a jury trial, where it exists, is so central to our system of Jurisprudence that abrogation of that right must be regarded as an extreme measure of last resort." 79 FRD at 70.

As recently as January 22, 1998 the United States Court of Appeals for the Seventh Circuit declared in *Kobs v. Arrow Service Bureau, Inc.*, 134 F.3d 893 at 896-898:

> "In *Sibley v. Fulton DeKalb Collection Service*, 677 F.2d 830 (11th Cir. 1982) the court held that a party upon timely demand is entitled to a jury trial in an action for damages under the FDCPA. Id. at 832. The court noted that there are two possible sources of a right of trial by jury for a statutory cause of action. Id. Congress may provide for trial by Jury in the statute that creates the claim regardless of whether the claim involves rights and remedies of the type traditionally enforced in a court of law before a jury. Id. Alternatively, if the claim involves rights and remedies of the type traditionally enforced in anaction at law,[1] the Seventh Amendment requires that the right of jury trial be preserved. Id."

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[1] Certainly the controversy in the instant case was an "action at law." It involved a dispute over a contract. See cases cited in Section II infra at page 12.

"The question then is whether the Seventh Amendment (fn. 1) to the Constitution mandates a jury trial. This analysis involves a determination of whether the rights under the statute are rights that would have been resolved historically at law by a jury or in equity by a judge and whether the relief requested by the plaintiff is traditionally granted by a jury at law or by a judge in equity. *Sibley*, 677 F.2d at 833; see *Curtis v. Loether*, 415 U.S. 189, 195-96, 94 S.Ct. 1005, 1009, 39 L.Ed.2d 260. The *Sibley* court found that because the rights under the FDCPA most resemble tort actions for collection abuses which traditionally have been viewed as being resolved at law and because the relief sought is monetary damages which is the traditional form of relief offered in the courts of law, the § 1692k(a)(2) reference to an allowance of damages by the court must be construed to anybody the right of trial by jury. *Sibley*, 677 F.2d at 834.

In reaching its decision, the Fourth Circuit relied on the Supreme Court's decision in *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260, which affirmed the Seventh Circuit's decision in *Rogers v. Loether*, 467 F.2d 1110 (7th Cir. 1972). In *Curtis*, plaintiff filed a private enforcement action under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.*, alleging racial discrimination in housing for which she requested both compensatory and punitive

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1. The Seventh Amendment provides that '[I]n suits at common law, when the value of the controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved.*****

> damages. 415 U.S. at 190, 94 S.Ct. at 1006. Defendants demand for a jury trial was denied, and the court awarded the plaintiff no actual damages and $250 in punitive damages. Id. at 191, 94 S.Ct. at 1006-1007. The Seventh Circuit reversed the district court on the jury trial issue and the Supreme Court affirmed in a unanimous decision. Id. The issue was whether a jury trial was required under 42 U.S.C. § 3612(e) which provides that '[t]he court may award to the plaintiff actual damages and not more than $1,000 punitive damages.' Finding a constitutional right to a jury trial, the Supreme Court reasoned that a damage action under Title VIII is an action to enforce legal rights, sounding basically in tort, and, more important, that the relief sought, actual and punitive damages, is the traditional form of relief offered in the courts of law. Id. at 195-96, 94 S.Ct. at 1009."

A jury trial should be granted in the absence of strong and compelling reasons to the contrary. *Mesa Petroleum Co. v. Coniglio,* 629 F.2d 1022 (5th Cir. 1980) and *Rhea v. Massey-Ferguson, Inc.,* 767 F.2d 266 (6th Cir. 1985). As long as it appears from the pleadings that there is an issue triable of right by a jury a plaintiff is entitled to a jury trial. *Laskaris v. Thornburgh,* 733 F.2d 260 (3rd Cir. 1984). Every reasonable presumption should be indulged in favor of the right to a jury trial. *Steele v. Brewery & Soft Drink Workers Local 1162,* 432 F.Supp. 369 (N.D. Ind. 1977).

> " . . . the origin of the duty sought to be enforced, whether in statute, contract, or the common law, does not control the seventh amendment's application. The test is not- . . . whether the specific claim was itself 'known' to the common law. Rather, it must be asked

> whether closely analogous rights and remedies were recognized by the common law. . . . " 432 F.Supp. at 372.

The District Court for the Western District of Michigan in 1983 in *Wood v. International Brotherhood of Teamsters Chauffeurs, Warehousemen & Helpers of America, Local 406*, 565 F.Supp. 1011 observed:

> "The right to trial by Jury in civil cases is a basic and fundamental feature of the system of federal jurisprudence. The Supreme Court has held that courts should zealously guard against any diminution of this right. *Jacob v. City of New York*, 315 U.S. 752, 452-53, 62 S.Ct. 854, 854-55, 86 L.Ed. 1166 (1942). Indeed, the Supreme Court has held trial by jury to be the 'normal and preferable mode of disposing of issues of fact in civil cases . . . ' and that 'any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick v. Schiedt*, 293 U.S. 474, 485, 55 S.Ct. 296, 300, 79 L.Ed. 603 (1935). As the Supreme Court stated somewhat more recently, '[t]he federal policy favoring Jury trials is of historic and continuing strength. . . . ' *Simler v. Conner*, 372 U.S. 221-222, 83 S.Ct. 609, 610, 9 L.Ed.2d 691 (1963). . . . "

Senior District Judge Dumbauld traced the history of the right to trial by jury in *United States of America v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980). Judge Dumbauld's incisive and thorough opinion warrants lengthy citation:

> "The Seventh Amendment upon which any constitutional right to jury trial in civil cases depends, provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by a* jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. (Italics supplied)

It should be noted that the Seventh Amendment created no new right to jury trial but merely preserves the right to jury trial in cases where it was enjoyed under pre-existing law.

This proposition, self-evident from the wording of the Amendment, has been recognized from the beginning in Supreme Court decisions. Perhaps the earliest discussion of the constitutional language was that of the celebrated Justice Joseph Story, sitting in the old Circuit Court for the District of Massachusetts, in *U.S. v. Wonson*, Fed.Cas.No. 16,750, 1 Gall. 5 (1812): 'Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our Jurisprudence.' [28 Fed.Cas. at 750, 1 Gall. 5] The same eminent jurist declared in *Parsons v. Bedford*, 3 Pet. 433, 446-47, 7 L. Ed. 732 (1830): 'The trial by jury is justly dear to the American people. . . . The phrase 'common law', found in this clause, is used in contradistinction to equity, and admiralty and maritime Jurisprudence.' Suits 'at common law' were 'suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same

> suit. . . . In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights' . . .
>
> . . . Our inquiry in the case at bar therefore is a historical investigation, whether under English and American practice, proximately prior to December 15, 1971, trial by jury was utilized in civil proceedings *in rem* for enforcement of statutory forfeitures in violation of customs laws or other statutes; or whether, on the other hand, such a proceeding fell within the scope of equity or admiralty, where jury trial was traditionally unavailable . . . " 618 F.2d 453 at 456-457, 458.

After thoroughly tracing the history of Anglo American Jurisprudence with respect to the right to trial by jury in cases involving In Rem seizures and admiralty law, Judge Dumbauld concludes that a jury trial was compelled in the case at bar:

> "Regrettably our conclusion may add to the caseload of the federal court system and require additional time in trying forfeiture cases. But ordinarily forfeiture proceedings are instituted in connection with criminal prosecutions arising out of the same transactions, and under modern procedures it should be practicable for the same jury to dispose of the civil and criminal proceedings concurrently and upon the same evidence. The fact that one facet of the case is *in rem* and the other *in personam,* that the burden of proof rests on different parties and is to be determined under a different standard, should cause no confusion if clear and adequate instructions are given by the trial court.

But in any event, mere inconvenience would be insufficient reason for denying a traditional and substantial constitutional right. *Curtis v. Loether*, 415 U.S. 189, 198, 94 S.Ct. 1005, 1010, 39 L.Ed.2d 260 (1974); *Pernell v. Southall Realty*, 416 U.S. 363, 383-85, 94 S.Ct. 1723, 1733-1734, 40 L.Ed.2d 198 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 265-66, 90 S.Ct. 1011, 1019, 25 L.Ed.2d 287 (1970).

Moreover, even as a matter of policy, weight must be given to the time-honored tradition of American commitment to jury trial, extending back to the Continental Congress (and, as was then believed, to the *legale judicium parium* in Magna Carta). Americans reading Blackstone's statement that 'trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law' rejoiced that even greater reverence was accorded to that cherished institution in the future kingless commonwealths of the new world. The strength of this national policy was recognized, as has been seen, by Justice Story, himself an advocate for extensive admiralty Jurisdiction, when in *Parsons v. Bedford* he declared: 'The trial by Jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment . . . which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.' Jury trial 'ranks high in

our catalogue of constitutional safeguards,' according to a more recent defender of democratic institutions, the late Justice Hugo Black. He regarded the jury as 'the constitutional tribunal provided for trying facts in courts of law,' and declared that 'The founders of our government thought that trial of fact by juries . . . was an essential bulwark of civil liberty.' *Toth v. Quarles*, 350 U.S. 11, 16, 76 S.Ct. 1, 5, 100 L.Ed. 8 (1955); *Berry v. U.S.*, 312 U.S. 450, 453, 61 S.Ct. 637, 638, 85 L.Ed. 945 (1941); *Galloway v. U.S.*, 319 U.S. 372, 397, 63 S.Ct. 1077, 1090, 87 L.Ed. 1458 (1943).

Furthermore, in the particular type of proceeding here involved, the infusion of the earthy common sense of a jury might upon occasion mitigate appropriately the harsh impact sometimes characteristic of *in rem* procedure, as discussed at the outset of this opinion. Both history and policy thus constrain us to conclude that this case must be remanded for jury trial.

Remanded for further proceedings in accordance with this opinion." 618 F.2d 453 at 468-469.

II.

THE DECISION OF THE TRIAL COURT AND THE COURT OF APPEALS OF WISCONSIN[2] DENYING THE PETITIONER A JURY TRIAL ON THE FACTUAL ISSUE OF WHETHER HE HAD "JUST CAUSE TO DISCHARGE HIS ATTORNEYS" WAS CLEARLY CONTRARY TO THE CONSTITUTIONS OF BOTH WISCONSIN AND THE UNITED STATES.

It is axiomatic that in all cases in which "legal" relief is available and "legal" rights are determined, a right to a jury trial is required under the Constitution. *Lorillard v. Pons,* 434 U.S. 574, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978). The relevant inquiry in determining the right to a jury trial is whether the statutes under which the suit is brought creates "legal rights, remedies enforceable in an action for damages in the ordinary courts of law." *United States v. Milwaukee County,* 457 F.Supp. 1009 (E.D. Wis. 1978) quoting from *Curtis v. Loether,* 415 U.S. 189, 194, 94 S.Ct. 1005, 1005-1008, 39 L.Ed.2d 260 (1974).

The Court of Appeals, District II for the State of Wisconsin in deciding that the petitioner was not entitled to a jury trial under the Wisconsin Constitution, Article 1, § 5 cited *Powers v. Allstate Ins. Co.,* 10 Wis.2d 78, 89, 102 N.W.2d 393, 399 (1960) (A-10). When closely examined *Powers,* however, is not precedent for denying the petitioner a jury trial. The *Powers* decision was handed down

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[2] The Court of Appeals' Opinion is unpublished and the Supreme Court of Wisconsin denied the Petition for Review. See Appendix, A-12 and A-2. The unpublished opinion can be said to compound the constitutional violation. In a manner of speaking the petitioner has been denied *meaningful* access to the courts.

by the Wisconsin Supreme Court almost forty years ago and does not concern itself with whether or not a party is entitled to a jury trial on the factual issue of whether or not an attorney was discharged from his employment by his client "for just cause."

Powers involved an action brought by a woman to recover damages for personal injury received while she was a passenger in an automobile as a result of a collision which occurred between it and another motor vehicle. The defendants were the two drivers and their insurance carriers. The case was tried to the court and a jury. The jury returned a special verdict wherein it found that both drivers were causally negligent and the plaintiff sustained a permanent injury. The plaintiff was awarded damages for pain and suffering and for permanent injury. On motions after verdict the trial court changed the jury verdict. On appeal to the Wisconsin Supreme Court the questions presented by the appeal were set forth at the beginning of the opinion as follows:

> "(1) Is there credible medical evidence to sustain the jury's finding of permanent disability?
>
> (2) If such question be answered in the affirmative, are the damages awarded for such permanent disability excessive?
>
> (3) If such damages are excessive, what is the proper option to extend to the plaintiff as an alternative to granting a new trial as to damages?"
>
> 10 Wis.2d 78 at 81.

The Supreme Court of Wisconsin in *Powers* concluded that a trial court was empowered to set aside an excessive

Jury award but established a rule that in those circumstances a plaintiff can opt for a reduced amount or for a second trial. The opinion does *not hold that a party to a breach of contract action is not entitled to a trial by jury.* To the contrary, the *Powers* court recognized that under the Wisconsin Constitution Jury trials are "mandatory" in "all cases at law without regard to the amount in controversy." (10 Wis.2d 88-89) And it went on to state:

> "The right to trial by jury preserved by this provision of our constitution is the right as it existed at the time of the adoption of the constitution in 1848. *Campbell v. Sutliff* (1927), 193 Wis. 370, 214 N.W. 374, 53 A. L.R. 771. The power of courts to set aside excessive verdicts and to grant new trials was firmly established even before the adoption of the United States constitution. Ibid. In the early case of *Corcoran v. Harran* (1882), 55 Wis. 120, 127, 12 N.W. 468, the court declared:
>
> 'We must therefore hold that, in actions of tort *as well as contract* where the damages are clearly excessive, the trial judge may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, and in case he does so order the verdict to stand for the residue. . . . "' (Emphasis supplied)

It is ironic that *Powers* expressly recognizes that contract disputes of fact are to be resolved by trial by jury when it cites the *Corcoran* opinion.

An action for damages for breach of contract has been triable by a jury as a matter of right throughout the history of Anglo American and Wisconsin jurisprudence. See *Dilger v. Estate of McQuade,* 158 Wis. 328, 148 N.W.

1085 (1914). Also see *Jansen v. Vils*, 34 Wis.2d 332, 149 N.W.2d 551 (1967); *Reiman Associates, Inc. v. R/A Advertising, Inc.*, 102 Wis.2d 305, 306 N.W.2d 292 (Ct. App. 1981); *Herkert v. Stauber*, 106 Wis.2d 545, 317 N.W.2d 834 (1982); *Entzminger v. Ford Motor Co.*, 47 Wis.2d 751, 177 N.W.2d 899 (1970); *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659 (1862); *Beers v. Kuehn*, 84 Wis. 33, 54 N.W. 109 (1893); *Ehrman v. Cook Elec. Co.*, 630 F.2d 529 (7th Cir. 1980) and *Carter Equipment Co. v. John Deere Indus. Equipment Co.*, 681 F.2d 386 (5th Cir. 1982).

As early as 1883 the Wisconsin Supreme Court acknowledged:

> "It is evident that § 5 [Article 1] Wisconsin Constitution referred to, was intended to secure the right to trial by Jury in civil and not criminal actions. The words in the section 'and shall extend to all cases at law, without regard to the amount in controversy,' clearly limit the provisions of that section to civil actions at law, and exclude the idea that it was intended to apply to criminal actions."
>
> *Bennett v. State*, 57 Wis. 69, 14 N.W. 912 (1883).

In *State v. Hansford*, 219 Wis.2d 226, 580 N.W.2d 171 (1998) Justice Crooks quoted from *Norval v. Rice*, 2 Wis. 17 (1853) as follows:

> "[W]hat greater security can any person have in his life, liberty or estate, than to be sure of not being divested of, or injured in any of these, without the sense of verdict of *twelve* honest and impartial men of his neighborhood? And hence we find the *common law herein* confirmed by

Magna Charta." Bacon's Ab., Title "Juries" vol. 5, p. 308. . . . " 219 Wis.2d at 237.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to the Wisconsin Supreme Court to review the decision of July 23, 1999 and the decision of the Court of Appeals, District II of the State of Wisconsin issued May 5, 1999.

Dated at Milwaukee, Wisconsin, this 8th day of October, 1999.

Respectfully submitted,

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[LOGO]

Office of the Clerk
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P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

TELEPHONE (608) 266-1880
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July 23, 1999

To:

Hon. James R. Kieffer
Waukesha County Circuit Court
515 W. Moreland Blvd.
Waukesha, WI 53188

Timothy J. Aiken
Aiken & Scoptur, S.C.
260 E. Highland Avenue, #700
Milwaukee, WI 53202-3131

Charles H. Barr
Croen & Barr
250 E. Wisconsin Ave., Ste 1020
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Terry E. Johnson
Peterson, Johnson & Murray, S.C.
733 N. Van Buren Street
Milwaukee, WI 53202

Willis J. Zick
Zick Law Offices
P.O. Box 1491
Waukesha, WI 53187-1491

You are hereby notified that the Court has entered the following order:

Nos. 97-3054 *Morters, et al. v. Kuenzli, et al.* L.c.#93CV1321 and 98-0589

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Ronald W. Morters, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND FILED

May 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-3054
98-0589

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

No. 97-3054

Ronald W. Morters,

Plaintiff-Appellant,

Ann Marie Morters, and Shannon L. Morters, a Minor, by Vincent Morters and Robin Maslakow, her general guardians,

Plaintiffs,

v.

Joseph R. Kuenzli and Shila A. Kuenzli, husband and wife, USAA Casualty Insurance Company, a Florida corporation, and Wisconsin Health Organization Insurance Corporation, a Wisconsin corporation,

Defendants,

Croen & Barr and Aiken & Scoptur, S.C.,

Respondents.

No. 98-0589

Ronald W. Morters,

Plaintiff-Appellant,

Ann Marie Morters, husband and wife, and Shannon L. Morters, a minor, by Vincent Morters and Robin Maslakow, her general guardians,

Plaintiffs,

Croen & Barr, Aiken & Scoptur, S.C., and Willis J. Zick,

Respondents,

v.

Joseph R. Kuenzli and Shila A. Kuenzli, husband and wife, USAA Casualty Insurance Company, a Florida corporation, and Wisconsin Health Organization Insurance Corporation, a Wisconsin corporation,

Defendants.

APPEALS from orders of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Robert W. Morters has appealed from an order entered in the trial court on September 19, 1997, determining that the law firms of Croen & Barr and Aiken & Scoptur, S.C., have valid attorneys' liens for one-third of the gross recovery awarded Morters and the other plaintiffs in this litigation. This appeal constitutes court of appeals case no. 97-3054. It is consolidated with

court of appeals case no. 98-0589, which constitutes Morters' appeal from an "Order Allocating Fees and Expenses Among Counsel" entered in the trial court on December 30, 1997.[1] We affirm the orders of the trial court.

This action arose from a motor vehicle accident in which Morters, his wife and his granddaughter were injured. Morters was originally represented by Attorney Charles H. Barr, but alleges that he discharged him for cause and retained the law firm of Aiken & Scoptur. Morters alleges that he then discharged that firm for cause and retained Attorney Willis J. Zick. The personal injury claims were subsequently settled through arbitration. After arbitration, Attorney Zick retained one third of the settlement proceeds paid to the Morterses, plus an amount representing expenses incurred by the various attorneys, pending an allocation of fees and expenses between counsel. A motion for an order allocating fees and expenses was then filed by Attorney Barr.

On August 29, 1997, the trial court conducted an evidentiary hearing on the issue of whether Attorney Barr and Aiken & Scoptur had valid, enforceable liens for attorneys' fees or whether Morters discharged them for cause. At the conclusion of the hearing, the trial court made findings of fact determining that Morters did not discharge Attorney Barr or Aiken & Scoptur for just

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[1] In his brief-in-chief in case no. 98-0589, Morters states that his appeal is from an order entered in the trial court on January 9, 1998, denying his motion for reconsideration of the December 1997 order. However, he withdrew this representation in his reply brief, reiterating that the appeal was from the December 1997 order allocating fees and expenses among counsel.

cause, and that their fee agreements with the Morterses were valid and enforceable. Based on these findings, the trial court determined that Aiken & Scoptur and Attorney Barr's law firm, Croen & Barr, had valid attorneys' liens for one-third of the gross recovery made by the Morterses in the arbitration of their claims.

In challenging this order, Morters argues that the trial court lacked jurisdiction to determine whether he and his family properly discharged Attorney Barr and Aiken & Scoptur. He further contends that if the trial court had jurisdiction to address this matter, he was entitled to a jury trial on it.

We reject Morters' arguments for several reasons. Initially, we note that at the August 29, 1997 hearing, Morters conceded that he was not disputing that he was required to pay one-third of the settlement proceeds as attorneys' fees. His claim was simply that Attorney Zick, as opposed to Attorney Barr or Aiken & Scoptur, was entitled to more of the fees.

A party must be aggrieved by an order to have standing to appeal it. *See* ***Mutual Serv. Cas. Ins. Co. v. Koenigs,*** 110 Wis.2d 522, 526, 329 N.W.2d 157, 159 (1983). A person is aggrieved if an order bears directly and injuriously upon his or her interests. *See* ***Ford Motor Credit Co. v. Mills,*** 142 Wis.2d 215, 217, 418 N.W.2d 14, 15 (Ct. App. 1987). The person must be adversely affected in some appreciable way. *See* ***id.*** at 217-18, 418 N.W.2d at 15. Because no basis exists to conclude that Morters' interests were adversely affected by the trial court's determination that Attorney Barr and Aiken & Scoptur were entitled to share with Attorney Zick in one-third of the settlement

proceeds, we are not persuaded that Morters has standing to challenge the September 19, 1997 order.[2]

Even assuming arguendo that standing exists, we reject Morters' claim that the trial court lacked jurisdiction to address the attorneys' fees issue. Circuit courts have the inherent power to determine the reasonableness of attorney's fees. *See* ***Herro, McAndrews & Porter, S.C. v. Gerhardt,*** 62 Wis.2d 179, 182, 214 N.W.2d 401, 402 (1974). This inherent power may be exercised either during the action from which the attorney's fees claim arises or in a subsequent action on that contract for attorney's services. *See* ***id.*** at 182, 214 N.W.2d at 402-03. "The trial court's inherent power does extend to cases where there is a direct attorney-client conflict regarding the attorney's right to a portion of a judgment." ***Estate of Boyle v. Wickhem, Buell, Meier, Wickhem & Southworth, S.C.,*** 134 Wis.2d 214, 220, 397 N.W.2d 124, 127 (Ct. App. 1986).[3] It

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[2] We recognize that an issue was also raised at the August 29, 1997 hearing as to whether the amount paid in settlement to the Morterses' subrogated carrier, Wisconsin Health Organization Insurance Corporation (WHO), should have been included by Attorney Zick when calculating one-third of the settlement proceeds. However, the trial court did not address or resolve that issue at the August 29, 1997 hearing or in the September 19, 1997 order, and specifically limited the issues which could be addressed at the hearing to the issues of whether Attorney Barr and Aiken & Scoptur had valid, enforceable liens for attorneys' fees, or whether Morters discharged them for cause. The issue of whether amounts paid to WHO should have been considered in calculating attorneys' fees therefore provides no basis for determining that Morters was aggrieved by the September 19, 1997 order.

[3] In his brief-in-chief, Morters quotes this statement from ***Estate of Boyle v. Wickhem, Buell, Meier, Wickhem &***

also has been exercised in situations where a dispute exists between successive attorneys as to the amount of their respective fees and the allocation of settlement proceeds to pay those fees. *See* ***Knoll v. Klatt,*** 43 Wis.2d 265, 268-69, 168 N.W.2d 555, 557 (1969), *overruled in part on other grounds by* ***Herro,*** 62 Wis.2d at 183-84, 214 N.W.2d at 403-04.

Contrary to Morters' contention, a trial court's inherent power to resolve an attorneys' fees issue between successive attorneys is not limited to situations where an attorney brings an independent action to recover fees. As already stated, the trial court's inherent authority may be exercised either during the action from which the attorney's fees claim arises or in a subsequent action on the contract for attorney's services. *See* ***Herro,*** 62 Wis.2d at 182, 214 N.W.2d at 402-03. Although the court in ***Boyle*** mandated that an independent action be brought, ***Boyle*** is distinguishable because it involved neither an attorney-client dispute nor a dispute between successive attorneys in an action. *See* ***Boyle,*** 134 Wis.2d at 220-21, 397 N.W.2d at 127. Rather, it involved a situation where the attorney hired by the litigants in an action contracted with another law firm for assistance in the case. *See* ***id.*** at 216, 397 N.W.2d at 125 Upon the death of the original attorney, a dispute arose between his estate and joint counsel as to

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Southworth, S.C., 134 Wis.2d 214, 220, 397 N.W.2d 124, 127 (Ct. App. 1986), but inserts the word "not" into the quotation and completely alters its meaning. This misstatement did not go unnoticed when the briefs were reviewed. However, in the reply brief in case no. 98-0589, Morters' counsel asserts that the misquotation was inadvertent, and we will say no more on the matter.

the allocation of fees. *See id.* at 217, 397 N.W.2d at 125. Because the dispute did not involve either the client and counsel or successive attorneys retained by the client, but was instead a dispute between joint contracting attorneys, this court concluded that the trial court did not have jurisdiction to resolve the dispute within the context of the underlying action. *See id.* at 220-22, 397 N.W.2d at 127. In contrast, this case involves a dispute between successive attorneys as to the allocation of fees generated in a case where all counsel were retained by Morters, and a claim by Morters that he owes no fees or limited fees to some of the attorneys. As such, the trial court had authority to resolve the dispute. *See id.* at 220-21, 397 N.W.2d at 127.

In making this determination, we conclude that Morters' reliance on ***McBride v. Wausau Ins. Cos.***, 176 Wis.2d 382, 500 N.W.2d 387 (Ct. App. 1993), is misplaced. In ***McBride***, an attorney commenced an independent action to recover attorney's fees from the settlement proceeds of an action in which she initially represented the injured plaintiff. *See id.* at 385-86, 500 N.W.2d at 388-89. Her action was dismissed on the grounds that she was not entitled to fees in accordance with the retainer agreement because she breached her contract with the plaintiff by providing deficient representation. *See id.* at 388, 500 N.W.2d at 390. Nothing in the case provides a basis to conclude that if counsel had sought to recover the fees by filing a motion in the underlying action rather than commencing a separate action, the trial court would have lacked authority to address that motion. Similarly, nothing in ***McBride*** or any of the other cases cited by Morters supports his contention that when a client alleges that he

or she discharged one or more of his or her attorneys for cause, the fee claims of the respective attorneys may be resolved only in an independent action by the attorneys, not as part of the underlying litigation for which they were retained.

Morters contends that if the trial court was entitled to address the attorneys' fees issue, then he was entitled to have a jury determine whether he discharged Attorney Barr and Aiken & Scoptur for cause. We disagree. As already noted, Morters did not dispute that he was required to pay one-third of the settlement as attorneys' fees and therefore has no standing to object to the trial court's determination that all of the attorneys must share in that fee. It follows that he also lacks standing to object to the trial court's refusal to grant a jury trial on that issue. Moreover, as already discussed, trial courts have inherent power to determine whether an attorney is entitled to fees and to apportion fees between successive attorneys within the context of the underlying litigation in which the fees arose. *See* ***Boyle,*** 134 Wis.2d at 220-21, 397 N.W.2d at 127. Such powers appear to have been uniformly exercised by the trial court without a jury.

Although he cites no statutory or case law indicating that a right to a jury trial exists under these circumstances, Morters contends that he was entitled to a jury trial under Article I, § 5 of the Wisconsin Constitution. However, the Wisconsin Constitution guarantees the right to a jury only as it existed at the time the constitution was adopted. *See* ***Powers v. Allstate Ins. Co.,*** 10 Wis.2d 78, 89, 102 N.W.2d 393, 399 (1960). Morters cites nothing to indicate that at the time the Wisconsin Constitution was adopted state law entitled a party to a jury

trial when his or her counsel sought to collect attorneys' fees within the context of the action in which the attorney was retained. No basis therefore exists to conclude that the trial court's refusal to permit a jury trial deprived Morters of a constitutional right, and its order of September 19, 1997 is affirmed.[4]

We similarly reject Morters' challenge to the December 30, 1997 order. In that order, the trial court allocated attorneys' fees between the three attorneys who had represented Morters during the course of this litigation. It awarded Attorney Zick $22,216.22 as fees and expenses. Based upon its finding that Attorney Barr and Aiken & Scoptur were entitled to one-third of the gross settlement in the action plus costs and disbursements, it jointly awarded them $163,578.84, which represented the amount withheld by Attorney Zick from the settlement proceeds and retained in a trust account. In determining what constituted the gross settlement in the action, it included the amount paid by settlement to Wisconsin Health Organization Insurance Corporation (WHO), the subrogated carrier in this case. Because Attorney Zick had not withheld any money arising from the payment to WHO, the trial court directed him to collect his $22,216.22 from the Morterses.

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[4] In his brief in case no. 97-3054, Morters also contends that he was entitled to a jury trial on the issue of whether payments made to the subrogated carrier should have been included in calculating the amount of attorneys' fees which constituted one-third of the gross settlement. However, because this issue was not before the trial court at the August 29, 1997 hearing, he was not entitled to a jury trial on it.

In his brief challenging the December 30, 1997 order, Morters reiterates the arguments which we have already rejected regarding the trial court's lack of jurisdiction to address the attorneys' fees issue and his right to a jury trial. The only variation in Morters' argument in case no. 98-0589 is his claim that the trial court lacked authority to address the amount of the fees owed.

Morters was represented by his present counsel at the time of the November 10, 1997 hearing at which the trial court heard argument and issued the rulings which were incorporated in the written order entered on December 30, 1997. Although Morters was aware that an issue had been raised at the August 29, 1997 hearing as to whether the payment to WHO should be considered in calculating the amount of attorneys' fees and he was served with the "Motion for Order Allocating Attorney's Fees and Expenses" prior to the November 10, 1997 hearing, he failed to appear at the hearing and thus failed to timely object to the trial court's determination that the settlement payment to WHO had to be included when calculating one-third of the gross settlement. Because he did not appear and object to the trial court's decision calculating attorneys' fees based on payments to WHO, Morters has waived his right to challenge that decision on appeal. *See* ***State v. Washington,*** 142 Wis.2d 630, 635, 419 N.W.2d 275, 277 (Ct.App.1987). Therefore, the December 30, 1997 order is also affirmed.

By the Court. – Orders affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

COPY

CIRCUIT COURT
Branch 8

STATE OF WISCONSIN WAUKESHA COUNTY

RONALD W. MORTERS, et al.,

Plaintiffs,

vs.

JOSEPH R. KUENZLI, et al.,

Defendants.

Case No. 93-CV-1321

30101 – Personal Injury – Auto

(Filed Sept. 19, 1997)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING ENFORCEABILITY OF FEE AGREEMENTS AND STATUTORY LIENS

The action came before the Court on August 29, 1997, for a hearing on the motion of Croen & Barr for a determination as to the validity of the attorneys' liens asserted by Croen & Barr and Aiken & Scoptur, S.C. for services performed on behalf of the plaintiffs in the above action. Appearances were as follows:

Attorneys James W. Hammes of Cramer, Multhauf & Hammes appeared for plaintiff Ronald W. Morters, who also appeared in person.

Attorney Charles H. Barr appeared for Croen & Barr.

Attorneys Timothy J. Aiken, Paul J. Scoptur and Kelly L. Centofanti appeared for Aiken & Scoptur, S.C.

Attorney Willis J. Zick appeared on his own behalf.

The Court, after hearing and considering the evidence and arguments presented by those who appeared, makes the following findings of fact:

1. The plaintiffs had no just cause to discharge Attorney Charles H. Barr or the firm of Croen & Barr, and therefore Croen & Barr was not discharged for cause.

2. The plaintiffs had no just cause to discharge the firm of Aiken & Scoptur, S.C., and therefore Aiken & Scoptur, S.C. was not discharged for cause.

3. The fee agreements between Charles H. Barr and each of the plaintiffs are valid and enforceable.

4. The fee agreements between Aiken & Scoptur, S.C. and each of the plaintiffs are valid and enforceable.

The Court makes the following conclusions of law:

1. Charles H. Barr has a valid attorney's lien for one-third of the gross recovery against the proceeds of the plaintiffs' claims pursuant to § 757.36, Wis. Stats.

2. Aiken & Scoptur, S.C. has a valid attorney's lien for one-third of the gross recovery against the proceeds of the plaintiffs' claims pursuant to § 757.36, Wis. Stats.

THEREFORE, the Court orders as follows:

1. That Croen & Barr and Aiken & Scoptur, S.C. have valid liens for one-third of the gross recovery made by Ronald W. Morters, Ann Marie Morters and Shannon L. Morters in the arbitration of their claims.

2. Willis J. Zick will continue to hold all funds that he currently holds in the Strong Funds account, which represent a portion of the proceeds of the plaintiffs' claims herein, pending further order of this Court.

Dated at Waukesha, Wisconsin, this 19th day of September, 1997.

BY THE COURT:

/s/ James R. Kieffer
Honorable James R. Kieffer
Circuit Judge, Branch 8

Drafted by:
Charles H. Barr – S.B.W. #1004802
Croen & Barr
250 East Wisconsin Avenue – Suite 1020
Milwaukee, Wisconsin 53202
414/226-2080

CONTINGENT FEE AGREEMENT

1. We, Ronald W. Morters and Ann M. Morters, husband and wife, having each been injured on December 21, 1990, in motor vehicle accidents, hereby agree to retain Charles H. Barr, of the law firm of CHARLES H. BARR, S.C., as our attorney, to make claims or bring suit against anyone necessary.

2. Our attorney is to receive 33 and 1/3% of the gross settlement or judgment for his legal services, except as modified below:

a. The amount recovered for the value of the motor vehicles involved in the accidents will not be included in the gross settlement or judgment for the purpose of calculating the fee for our attorney's legal services.

b. If settlement is reached with any party before commencement of trial, our attorney is to receive for his legal services 25% of such gross settlement, plus the otherwise applicable percentage of any other recovery.

c. If an insurance company pays its policy limit prior to filing of suit, our attorney is to receive for his legal services the greater of 10% of such policy limit or $130 per hour, but in any event not more than 25% of

such policy limit, plus the otherwise applicable percentage of any other recovery.

3. Our attorney is hereby given a continuing lien in our claim and the proceeds thereof for the amount of the fee, pursuant to section 757.36, Wis. Stats.

4. We also have been informed that we are responsible to pay for costs and disbursements, including, but not limited to costs and disbursements for service and filing fees, courier or messenger services, recording and certifying documents, depositions, transcripts, investigators, witness fees, long distance telephone services, copying materials, travel expenses, postage, computer research, and the fees and other charges of experts and consultants. Our attorney may, but is not obligated to, advance these and other costs and disbursements he believes are reasonable and necessary in preparing and prsenting [sic] any claim. Any costs and disbursements advanced by our attorney for which he was not reimbursed will be paid to our attorney from the gross recovery after calculation of attorney's fees. In the event there is no attorney's fee, we agree to reimburse our attorney for costs and disbursements within thirty days of receiving a written statement therefor.

5. We understand that if no recovery is obtained for us, no attorney's fee will be due; however, we shall remain responsible for costs and disbursements. We also understand that settlement will not be made without our approval or the approval of our guardian.

6. We understand that by signing this agreement, we are promising not to disclose the names of any experts or consultants hired in regard to our case. We further

understand that the names of any experts or consultants hired in regard to our case are the property of our attorney and are not our property. We expressly agree that our attorney may promise experts and consultants that their names and reports will not be revealed to anyone other than ourselves.

7. We understand that our attorney may withdraw if he believes that our case lacks merit or is not fiscally responsible to pursue.

8. We understand that in the event that, contrary to the advice of our attorney, we instruct our attorney to discontinue the matter, the matter will be discontinued and we shall pay the attorney a reasonable hourly rate, plus expenses, for the time he has expended in our behalf.

9. We have read and our attorney has explained the above eight points of this agreement and we understand the same.

Date: Jan 5, 1991 /s/ Ronald W. Morters
Ronald W. Morters

Date: January 3, 1991 /s/ Ann M. Morters
Ann M. Morters

CHARLES H. BARR, S.C.

Date: January 2, 1991 /s/ Charles H. Barr
By: Charles H. Barr

CROEN
BARR
ATTORNEYS AT LAW

250 East Wisconsin Avenue
Suite 1020
Milwaukee, Wisconsin 53202
Telephone 414 226 2080
FAX 414 226 2070

[Request granted – requirement of motion to adjourn waived due to strong possibility case would be "bumped" for 8-8 trial.

They must call in the week of 8/15 for new trial date. 9/2

7/25 /s/ PLS (initials of Judge Patrick L. Snyder)

/s/ Laura 7/25

July 23, 1994

HAND DELIVERED

Honorable Patrick L. Snyder
Circuit Judge, Branch 4
Waukesha County Courthouse
515 West Moreland Boulevard
Waukesha, WI 53188

RE: Morters v. Kuenzli, et al., No. 93-CV-1321

Dear Judge Snyder:

This action is scheduled for jury trial on August 15, 1994, at 1:30 p.m. Attorney Terry Johnson and I have been discussing settlement, and we have reached the point where we both feel that mediation would be helpful in resolving the matter. We have agreed to mediate before the Honorable John R. Decker. Judge Decker is willing to mediate the matter, but the earliest mutually available

time to do so is the date and time of trial – August 15, 1994, at 1:30 p.m. I therefore request that the jury trial be adjourned to permit mediation, and I am authorized to state that Attorney Johnson joins in this request.

I regret the timing of this request. In hindsight we should have agreed to mediate earlier. I assure the Court that neither party deliberately delayed this request in order to obtain an adjournment of the trial. Moreover, we are optimistic that mediation will resolve the matter and thereby save substantial judicial and private resources. Obviously we cannot guarantee that result, but we do guarantee our best and good faith efforts to achieve it. Judge Decker is the first choice of both parties as mediator, and we are confident of his abilities in this regard.

In the event that mediation is unsuccessful – a possibility which is hopefully remote – we would prefer the shortest possible adjournment.

Thank you for your consideration of this request. I shall call your calendar clerk to ascertain the Court's response.

Very truly yours,

/s/ Charles H. Barr
Charles H. Barr

hs

c: Atty Terry E. Johnson
Atty John Garofani

AIKEN & SCOPTUR, S.C.
ATTORNEYS AT LAW
260 EAST HIGHLAND AVENUE
SUITE 700
MILWAUKEE, WI 53202-3131

TELEPHONE (414) 225-0260
FACSIMILE (414) 225-9666

[Names Omitted In Printing]

Mr. and Mrs. Ronald Morters
2755 Minot Lane
Waukesha, WI 53188-4523

Re: Morters v. Kuenzli, et al
Case No. 93-CV-1321
Our File No. 94-201

Dear Mr. and Mrs. Morters:

This will confirm our agreement regarding the stipulation on negligence and arbitration in this matter.

1) You have both given permission for me, as your attorney, to sign the stipulation being drafted by Mr. Johnson which sets forth the following:

a) Ron Morters damages are reduced by 10%;

b) Ann Morters damages are reduced by 22%;

c) Your case will be submitted to binding arbitration by an independent arbitrator, agreeable to attorneys on both sides.

2) You have indicated that you do not want to *personally* sign the stipulation because the facts contained in the stipulation violate your principles. This will confirm

that we will *not* ask you to sign the stipulation or testify regarding this stipulation.

By the time you recieve [sic] this letter, we will have already signed the stipulation, because time was becoming of the essence, vis a vis the trial date and the scheduling of witnesses and the necessary notification to the court. However, *we would still ask you to please sign a copy of this letter only, where indicated at the bottom of this letter, and return it to me in the envelope provided.* Thank you for your cooperation in this regard.

Very truly yours,

/s/ Timothy J. Aiken
TIMOTHY J. AIKEN

Date: _____ _____
RON MORTERS

Date: _____ _____
ANN MORTERS

STATE OF WISCONSIN
CIRCUIT COURT WAUKESHA COUNTY

RONALD W. MORTERS, ANN MARIE MORTERS, and SHANNON L. MORTERS, a minor, by VINCENT MORTERS and ROBIN MASLAKO, her general guardians,

Plaintiffs,

vs. Case No. 93-CV-1321

JOSEPH R. KUENZLI and SHILA A. KUENZLI, USAA CASUALTY INSURANCE COMPANY, and WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION,

Defendants.

STIPULATION AND ORDER FOR DISMISSAL PENDING ARBITRATION

IT IS STIPULATED AND AGREED, by and between the parties, as follows:

1. That the trial of this matter now set for July 31, 1995, may be dismissed so that the dispute between the parties may be resolved by binding arbitration.

2. That this action may be dismissed on the merits and without costs subject to the right of the parties pursuant to this stipulation to move to reopen the action for the sole and limited purpose of enforcing any award made by the arbitration referenced hereunder.

3. That for purposes of determining the amount of any recovery by any plaintiff, the claim of Ronald Morters shall be reduced by 10%, the claim of Ann Marie Morters shall be reduced by 22%, and the claim of Shannon L. Morters shall be reduced by 10%.

4. That causal negligence and liability on the part of the defendants, Joseph R. Kuenzli and USAA Casualty Insurance Company, subject to the reductions provided for in paragraph 3 of this stipulation, is admitted as to the claims of each plaintiff.

5. That arbitration shall proceed before George W. Greene on a schedule to be agreed upon by the parties and Mr. Greene.

6. That Mr. Greene's expenses shall be borne equally by plaintiffs, Ronald W. Morters, Ann Marie Morters and Shannon L. Morters, and by defendants, Joseph R. Kuenzli, Shila A. Kuenzli and USAA Casualty Insurance Company, with each side paying 50%.

7. That the scope of the issues to be arbitrated before Mr. Greene shall be damages only; that Mr. Greene shall in no way be advised as to the resolution of the liability issues other than to be advised that liability is not an issue for him to resolve; that Mr. Greene shall not be advised as to any settlement offer or settlement demand made.

8. That upon issuance of a decision on damages by Mr. Greene, any motion to reopen this action for purposes of enforcing the arbitration award shall be brought within sixty days of the issuance of that decision.

9. That this stipulation may be executed in counterparts and that execution and transmission of executed papers by facsimile shall be as effective as an original.

10. That an order in accordance with this stipulation may be entered without further notice to any party.

AIKEN & SCOPTUR, S.C.
Attorneys for Plaintiffs

Dated: 14 June 95

By: /s/ Timothy J. Aiken
Timothy J. Aiken
State Bar No.
1015763

MITCHELL, BAXTER & ZIEGER, S.C.
Attorneys for Defendant, Wisconsin Health Organization Insurance Corporation

Dated: 6/23/95

By: /s/ John K. Garofani
State Bar No.
1020882

PETERSON, JOHNSON & MURRAY, S.C.
Attorneys for Defendants, Joseph R. Kuenzli, Shila A. Kuenzli and USAA Casualty Insurance Company

Dated: 6/14/95

By: /s/ Terry E. Johnson
Terry E. Johnson
State Bar No.
0106704

Based on the foregoing stipulation of the parties, and on motion of PETERSON, JOHNSON & MURRAY, S.C., attorneys for defendants, Joseph R. Kuenzli, Shila A. Kuenzli and USAA Casualty Insurance Company,

IT IS ORDERED:

1. That the foregoing stipulation of the parties be, and is hereby, adopted by the court.

2. That arbitration shall proceed before George W. Greene at a time and place to be agreed upon by Mr. Greene and counsel.

3. That the trial of this matter previously scheduled for July 31, 1995, be, and is hereby adjourned.

4. That, subject to the right to reopen to enforce any arbitration award referenced in the stipulation, the above-entitled action be, and is hereby, dismissed on the merits and without costs.

Dated at Milwaukee, Wisconsin, this 29 day of June, 1995.

BY THE COURT:

/s/
Circuit Court Judge

MR & MRS R W MORTERS
2755 MINOT LANE
WAUKESHA WI
53188-4523
JULY 17 1995
JUL 18, 1995

MESSR'S AIKEN & SCOPTUR ATT'S
260 E HIGHLAND AVE SUITE 700
MILWAUKEE WI 53202

SIRS

BY THIS HAND DELIVERED LETTER OF ABOVE DATE MY WIFE AND I ARE TERMINATING OUR RETAINMENT OF YOUR SERVICES AS ATTORNEYS FOR THE PLAINTIVES [sic] IN THE SUIT AGAINST JOSEPH R KUENZLI ET AL.

CASE #93 CV 1321 WAUKESHA COUNTY COURT

THE EFFECTIVE DATE TO BE JUNE 30 1995 ON WHICH DATE I WAS TOLD BY THE CALENDAR CLERK OF COURT 4. JUDGE SNYDER THAT YOU HAD WITHOUT NOTIFYING US HAD THE CASE DISMISSED AND SUBJECT TO ARBITRATION.

THE LETTER OF K CENTOFANTI OF JULY 5 1995 IN WHICH SHE CALLED ME A LIAR AND WHICH SHOWED YOUR PREJUDICE IN THIS CASE CONFIRM MY COMMENTS TO CHANGE ATTORNEYS.

THE CASE RECORDS WILL BE TRANSFERRED TO MY NEW ATTORNEY WILLIS J ZICK 151 BANK ST WAUKESHA BY MYSELF TO PREVENT FURTHER DELAY AND CHARGES

IF YOU REQUIRE MESSENGER SERVICE IT WILL BE AT YOUR OWN EXPENSE. I PICK UP FILES ZICK.

THIS DISMISSAL LETTER IS WITH ACCORD BETWEEN MY WIFE AND I .

/s/ Ronald W Morters
RONALD W MORTERS

ANN M MORTERS
/s/ Ann M Morters

RECEIPT ACKNOWLEDGED
/s/ Illegible

STATE OF WISCONSIN
CIRCUIT COURT WAUKESHA COUNTY

RONALD W. MORTERS, ANN MARIE MORTERS, and SHANNON L. MORTERS, a minor, by VINCENT MORTERS and ROBIN MASLAKOW, her general guardians,

Plaintiffs,

vs

JOSEPH R. KUENZLI AND SHILA A. KUENZLI, USAA CASUALTY INSURANCE COMPANY, and WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION,

Defendants.

ARBITRATOR'S DECISION

Waukesha County Case No.: 93 CV 1321

A binding arbitration hearing was held on June 13, 1996 at 9:30 a.m. The hearing was held at the Zick Law Office, Waukesha, subject to the terms of the arbitration agreement entered into between the parties.

Those in attendance included:

Attorneys: Willis J. Zick, for all Plaintiffs.
Terry E. Johnson, for Defendants Kuenzli & USAA Casualty Insurance Company.

Parties: Ronald W. Morters
Ann Marie Morters
Shannon L. Morters and her Co-Guardian,
Robin Maslakow

THE ARBITRATOR, MARK FARNUM, HEREBY MAKES THE FOLLOWING FINDINGS:

That Ronald Morters should be awarded money damages to compensate him for his personal injuries, loss of earnings and earning capacity, together with past and future medical and hospital expenses, as enumerated and set forth herein.

That all psychiatric care and treatment and medical expense paid by Wisconsin Health Organization Insurance Corporation on behalf of Ronald Morters shall be allowed.

That Ronald Morters should not be compensated for claimed losses arising from the sale of investment property.

That Ann Marie Morters should be similarly compensated as hereinafter concluded but without compensation for future medical and hospital expenses.

That determinations on all matters involving Shannon L. Morters shall be deferred pending further submissions from counsel as agreed on June 13, 1996.

UPON THE TESTIMONY, DOCUMENTS RECEIVED AND FINDINGS HERETOFORE MADE, I CONCLUDE AS FOLLOWS:

RONALD W. MORTERS

For personal injuries, consisting of past and future pain, suffering, disfigurement and disability, including aggravation of his pre-existing psychiatric depression and further, including the loss of services, society and companionship arising out of injuries sustained by his wife Ann Marie in the same accident, Ronald W. Morters is awarded the sum of $285,000.

For past and future loss of earnings and loss of earning capacity, Ronald W. Morters is awarded the sum of $150,000.

For past and future medical and hospital expenses, consisting of out-of-pocket expenses and future dental expenses, Ronald W. Morters is awarded the sum of $6851.00.

Past medical and hospital expenses paid by Wisconsin Health Organization Insurance Corporation were reasonable in amount and necessary for the treatment of Ronald W. Morters, including psychiatric care. The Wisconsin Health Organization Insurance Company subrogation claim is allowed as stated.

No award is made to compensate for alleged losses arising from the sale of investment property.

ANN MARIE MORTERS

For personal injuries consisting of past and future pain, suffering, disfigurement, and disability, including

damage to her brain and further, including loss of services, society, and companionship of her husband, Ronald W. Morters, incurred in the same accident, Ann Marie Morters is awarded $77,500.

For past and future loss of earnings and loss of earning capacity, Ann Marie Morters is awarded $10,000.

All medical expenses paid by Wisconsin Health Organization Insurance Corporation for Ann Marie Morters are allowed.

SHANNON L. MORTERS

Awards, if any, are deferred.

Dated at Beloit, Wisconsin, this 3 day of July, 1996.

By: /s/ Mark J. Farnum
Mark J. Farmun, Arbitrator

STATE OF WISCONSIN : WAUKESHA COUNTY
CIRCUIT COURT

RONALD W. MORTERS and ANN MARIE MORTERS, husband and wife, and SHANNON L. MORTERS, a minor, by VINCENT MORTERS and ROBIN MASLAKOW, her general guardians,

Plaintiffs,

Case No. 93-CV-1321

Code No. 30101

v.

JOSEPH R. KUENZLI and SHILA A. KUENZLI, husband and wife, USAA CASUALTY INSURANCE COMPANY, a Florida corporation, and WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION, a Wisconsin corporation,

Defendants.

AFFIDAVIT OF RONALD W. MORTERS

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

Ronald W. Morters, being first duly sworn on oath, deposes and states as follows:

1. That your affiant is an adult individual, and has personal knowledge of the facts set forth herein, and

makes this affidavit on behalf of himself and the interests of Ann Marie Morters, your affiant's wife, who is now deceased.

2. That your affiant, together with your affiant's wife, Ann Marie Morters, executed a contingent fee agreement, a copy of which is appended to the affidavit of Attorney Charles Barr as Exhibit "A".

3. That your affiant, together with your affiant's wife, Ann Marie Morters, discharged the law firm of Charles H. Barr, S.C. during the pendency of litigation, for cause, in that, among other things, the said law firm caused the trial of the above-entitled matter to be removed form the court calendar, without the knowledge, consent, or permission of the affiant, and further, that the law firm agreed to mediate the dispute between the parties.

4. That subsequent to the discharge of the law firm of Charles H. Barr, S.C. from representation of your affiant and your affiant's wife, Ann Marie Morters, in the above-entitled action, your affiant retained the law firm of Aiken & Scoptur, S.C., which law firm was also discharged form representation in the above-entitled proceeding, for cause. Further, that thereafter, your affiant, and your affiant's wife, Ann Marie Morters, retained the services of attorney Willis J. Zick, who successfully prosecuted the resolution of the controversy arising out of the above-entitled matter.

5. That your affiant is of the opinion and belief that the law firm of Charles H. Barr, S.C. breached its contract of representation (with your affiant and your affiant's wife, Ann Marie Morters), and that such breach was

material and substantial and, further, that as a result of such breach, your affiant, and your affiant's wife, Ann Marie Morters, caused the contract of representation to be terminated.

6. That your affiant disputes the contention of Attorney Charles H. Barr, as set forth in his affidavit, as to the amount of any fee earned by the law firm of Charles H. Barr, S.C. incident to its representation of your affiant and your affiant's wife, Ann Marie Morters, in the above-entitled action, and further, that neither your affiant or your affiant's wife, Ann Marie Morters, agreed to pay the law firm of Charles H. Barr, S.C. the sum of Ninety Thousand Dollars ($90,000.00), plus out-of-pocket costs and disbursements.

7. That your affiant did not authorize nor consent to representation or legal services of Charles H. Barr, S.C. subsequent to the termination of the contract between the parties.

BY: /s/ Ronald W. Morters
RONALD W. MORTERS

Subscribed and sworn to before me
this 5 day of March, 1997.

/s/ Illegible
Notary Public, Waukesha Co., WI
Commission (expires): permanent

sad/pleading/morters.af1

STATE OF WISCONSIN : WAUKESHA COUNTY
CIRCUIT COURT

RONALD W. MORTERS and ANN MARIE MORTERS, husband and wife, and SHANNON L. MORTERS, a minor, by VINCENT MORTERS and ROBIN MASLAKOW, her general guardians,

Plaintiffs,

v.

JOSEPH R. KUENZLI and SHILA A. KUENZLI, husband and wife, USAA CASUALTY INSURANCE COMPANY, a Florida corporation, and WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION, a Wisconsin corporation,

Defendants.

Case No. 93-CV-1321

Code No. 30101

AFFIDAVIT OF RONALD W. MORTERS

(Filed Nov. 24, 1997)

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

Ronald W. Morters, being first duly sworn on oath, deposes and states as follows:

1. That your affiant is an adult individual, is a Plaintiff in the avove-entitled action, and has personal knowledge of the facts set forth herein.

2. That at the time your affiant entered into the Contingent Fee Agreements, which are the subject matter of the above-entitled dispute, as between the Plaintiff and the law firms of Aiken & Scoptur, S.C. and Charles H. Barr, S.C., your affiant understood that his obligation to pay one-third of the amounts recovered to the law firms for attorneys fees did not include any sums awarded for medical expenses and paid to subrogated medical insurance carriers.

3. That your affiant's understanding and belief as to the nature of your affiant's obligation under the Contingent Fee Agreements was reaffirmed during various conversations between Charles H. Barr and your affiant, as well as various conversations between Attorney Paul J. Scoptur and your affiant. Further, specifically, during a conversation between Attorney Paul J. Scoptur and your affiant which occurred in April, 1995, which conversation involved efforts by Attorney Paul J. Scoptur to convince your affiant to accept an assessment of ten percent contributory negligence, Attorney Paul J. Scoptur affirmatively stated to your affiant that the attorneys fees would similarly be reduced by the ten percent contributory negligent assessment, and that the law firm would not be entitled to receive attorneys fees with respect to any medical insurance payments paid to the subrogated medical insurance carriers.

4. That, at the conclusion of the prior hearing in the above-entitled matter, at which time the court determined

that your affiant had not discharged the law firms of Charles H. Barr, S.C. and Aiken & Scoptur, S.C. "for cause", and, further, that both law firms were entitled to a statutory attorney's lien upon the proceeds recovered, your affiant understood that any further or subsequent hearing would involve only the law firms and Attorney Willis J. Zick, and would consider only the obligation of those fees that have been withheld. Your affiant understood and believed that his participation in the issue had bee finally determined by the court, and that no further issue remained as to the interpretation of the Contingent Fee Agreements and, in particular, with respect to any issue as to the amount of attorneys fees to which the various law firms would be entitled an allocation under any subsequent court order.

BY: /s/ Ronald W. Morters
RONALD W. MORTERS

Subscribed and sworn to before me this 19th day of November, 1997.

/s/ Shari A. De Francs
Notary Public, Waukesha Co., WI
Commission (expires): 1/23/00

STATE OF WISCONSIN WAUKESHA COUNTY
CIRCUIT COURT

Branch 8

RONALD W. MORTERS and ANN MARIE MORTERS, husband and wife, and SHANNON L. MORTERS, a minor, by VINCENT MORTERS and ROBIN MASLAKOW, her general guardians,

Plaintiffs,

v.

JOSEPH R. KUENZLI and SHILA A. KUENZLI, husband and wife, USAA CASUALTY INSURANCE COMPANY, a Florida corporation, and WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION, a Wisconsin corporation,

Defendants.

Case No. 93-CV-1321

30101 – Personal Injury – Auto

NOTICE OF MOTION AND MOTION FOR ORDER ALLOCATING ATTORNEY'S FEES AND EXPENSES

TO: Deputy Clerk of Court, Branch 8
Waukesha County Circuit Court
515 West Moreland Boulevard
Waukesha, WI 53188

Attorney Paul J. Scoptur
Aiken & Scoptur SC
260 East Highland Avenue #700
Milwaukee, WI 53202

Attorney Willis J. Zick
151 Bank Street
P.O. Box 1491
Waukesha, WI 53187

Attorney James W. Hammes
Cramer, Multhauf & Hammes
1601 East Racine Avenue #200
P.O. Box 558
Waukesha, WI 53187
Attorneys for Plaintiffs

PLEASE TAKE NOTICE that on November 4, 1997, at 9:45 a.m., or as soon thereafter as counsel can be heard, in Room 278 of the Waukesha County Courthouse, 515 West Moreland Boulevard, in the City and County of Waukesha, State of Wisconsin, the undersigned, on his own behalf, will move the Honorable James, R. Kieffer, Circuit Judge, Branch 8, as follows:

The undersigned respectfully moves for an order allocating the attorney's fees and expenses in the above action among the attorneys who have served as counsel of record for the plaintiffs herein. This motion is based upon all the files and proceedings herein.

This motion requests resolution of an issue upon which the Court reserved ruling at the motion hearing held in this action on August 29, 1997. On the issue of the Court's jurisdiction to resolve that issue, the undersigned incorporates pages 1-4 of this memorandum of law dated March 9, 1997, and served and filed herein. The applicable methodology for allocating the fees and espenses is discussed in *Knoll v. Klatt*, 43 Wis.2d 265, 168 N.W.2d 555 (1969), and *Tonn v. Reuter*, 6 Wis.2d 498, 95 N.W.2d 261 (1959).

Dated at Milwaukee, Wisconsin, this 26th day of Septetmber, 1997.

CROEN & BARR

By: /s/ Charles H. Barr
Charles H. Barr – S.B.W.
#1004802

P.O. Address
250 East Wisconsin Avenue – Suite 1020
Milwaukee, Wisconsin 53202
414/226-2080

STATE OF WISCONSIN : : WAUKESHA COUNTY
CIRCUIT COURT
BRANCH VIII

RONALD W. MORTERS and
ANN MARIE MORTERS,
husband and wife, and
SHANNON L. MORTERS,
a minor, by VINCENT MORTERS
and ROBIN MASLAKOW,
her general guardians,

Plaintiffs,

vs.

JOSEPH R. KUENZLI and, SHILA A.
KUENZLI, husband and wife, USAA
CASUALTY INSURANCE COMPANY,
a Florida corporation, and
WISCONSIN HEALTH ORGANIZATION
INSURANCE CORPORATION, a
Wisconsin corporation,

Defendants,

CROEN & BARR and
AIKEN & SCOPTUR, S.C.,
Respondents.

MOTION HEARING

Case No. 93-CV-1321

August 29, 1997

Honorable James R. Kieffer,
Circuit Court Judge,
Branch VIII, presiding

APPEARANCES

JAMES W. HAMMES, Attorney at Law, from the law firm of Cramer, Multhauf & Hammes, appeared with and on behalf of the Plaintiff, Ronald W. Morters.

WILLIS J. ZICK, Attorney at Law, appeared on behalf of himself.

CHARLES H. BARR, Attorney at Law, from the law firm of Croen & Barr, appeared on behalf of his law firm.

[p. 2] TIMOTHY J. AIKEN, PAUL J. SCOPTUR, and KELLY L. CENTOFANTI, Attorneys at Law, from the law firm of Aiken & Scoptur, S.C., appeared on behalf of their own law firm.

* * * * * * * * * *

Bonita L. Zeniecki, Registered Merit Reporter Official Court Reporter, Branch VIII

* * *

[p. 4] TRANSCRIPT OF PROCEEDINGS

THE COURT: Please be seated. The Court would call Case No. 93-CV-1321. If I could have the appearances of counsel, please?

MR. HAMMES: The Plaintiff appears by Cramer, Multhauf & Hammes by James Hammes. Ronald Morters is present in court as well.

MR. BARR: Good morning, Your Honor, Croen & Barr appears by Charles Barr.

MR. AIKEN: Good morning. Aiken & Scoptur appears by Timothy Aiken. Paul Scoptur also is appearing and Kelly Centofanti is also present in court.

MR. ZICK: Willis J. Zick appearing on behalf of myself, Your Honor.

THE COURT: All right. We are here today to deal with a motion that was filed by Mr. Barr asking to allocate the attorney fees and expenses. I saw that recently there was some correspondence back and forth amongst counsel as to the scope of this particular hearing. I guess, counsel, if you can let me know what parameters you want this hearing to take.

Mr. Barr?

MR. BARR: Your Honor, it's my motion, and as the Court noted, I did file a motion requesting [p. 5] allocation of the fee amongst counsel. My understanding is the position of Aiken & Scoptur is that the Court should limit its ruling today to the validity of the fee contracts involved or both as is appropriate, and since I am relying in the first instance upon the contract between Aiken & Scoptur and the Morters' family, that I shall defer to that position because it's their contract that I believe that should – The Court should determine the validity of that contract first, and only if that contract is held to be invalid, address the issue of whether my contract or my firm's contract with the Morters is valid. That being the case, I'm going to defer to the legal position of Aiken & Scoptur as the scope of the hearing here today.

THE COURT: Mr. Aiken?

MR. AIKEN: Judge, I believe there's a case on point which is the *Estate of Boyle* case which states the division of fees would not be within the jurisdiction of this Court, so it's our position that the issue on hand is the validity of the one or both, and we don't need both of the legal contracts entered into by Mr. Morters with Mr.

Barr or with my firm, No. 1; the potential validity of his claim that we should have – we were discharged for cause, and therefore, we would be compensated on a quantum meruit basis, and I think that [p. 6] would be the extent of the motions at this point in time. The case is the *Estate of Boyle* case involved –

THE COURT: I read it.

MR. AIKEN: So, I think it clearly provides that there shall be no such hearing at this point in time.

On top of that, Your Honor, we have the problem that our fee agreement provided for a one-third fee of the gross settlement and the amount that's been retained by Attorney Zick in his account is $22,000 short of that amount, so we have – so we're going to have to ask for the enforcement of our lien as well if the agreement is enforceable which, of course, we believe it is.

THE COURT: Thank you, Mr. Hammes?

MR. HAMMES: I'm not sure if I understand Mr. Aiken's comments exactly as to the position. He's saying we should go ahead with the hearing today or not I'm a little confused by that. It's my –

THE COURT: I interpreted it to mean that so that we could determine – I think what we have to determine is the validity of or the enforcement of the contract with Mr. Aiken's firm, and I think also secondarily whether or not Mr. Barr was dismissed for cause to – At least, that's how I've kind of looked at this particular case.

[p. 7] MR. HAMMES: Well, I don't think the case cited by Mr. Aiken is the correct legal principle. The

problem we have, as I see it, and I've raised this before, is you've just asked for the appearances in this case, and I notice that three appearances were made, and yet none of those appearances are parties of record, and nobody appeared for the Defendant in this case. Let's assume this. Let's assume –

THE COURT: There was a letter in the file, Mr. Hammes, as it related to that. Mr. Johnson wrote a letter dated July 3rd, 1997, indicating that since this was a dispute amongst the various lawyers who represented the Plaintiffs as to the division of their fees and it didn't involve he or his clients, he wasn't going to be present.

MR. HAMMES: Oh, I understand that, but what I'm saying is let's assume that a decision is made in this case which is adverse to Mr. Morters and he wants to appeal the case. I can't – How can he appeal a decision as against entities or law firms, for example, that are not parties to a litigation? You see, this is not a division of – and I think that perhaps the last two positions that were noted puts it in a better perspective – this is not a hearing about the allocation of monies as between two or probably three [p. 8] law firms if you involve Mr. Zick in it. This is a hearing about whether or not a contract between Aiken & Scoptur and Mr. Morters is valid, whether it was a breach of that contract. If there was a breach of that contract, what is the remedy including and – in other words, the quantum meruit basis or a percentage of the fee that was held. That situation, Your Honor, that's a breach of contract case.

This is a case where Mr. Morters is entitled to a jury determination as to whether or not Aiken & Scoptur

performed their contract for legal services that were caused for the terms of the agreement between the parties. This is a case and that's why – and I brought this to the Court's attention earlier. If you're talking about the cases that are cited by counsel for – by counsel asking for allocation of fees as a trial court assuming the jurisdiction to determine as between two law firms, what portion of the fee each one gets or in this case three law firms, where there's no dispute as between the parties in this case, Morters paying the fee; in other words, they don't dispute that. They just dispute the allocation of it, and the Court, all it's doing is saying, "Well, I'll just make that decision, but here, as indicated, the issue is whether or not there was a breach of contract as between Morters and [p. 9] Aiken & Scoptur, S.C. and/or Morters and Charles H. Barr, S.C. That's a breach of contract case, and I don't think the Court has jurisdiction to make that decision on motions, and I can cite to the Court a case that's directly on point, the case of *McBride* –

THE COURT: – *vs. Wausau Insurance Company.*

MR. HAMMES: – *Wausau Insurance Company* at 176 Wis.2d 382, and that's exactly what – I have a copy if the Court wants to review it. That's exactly what happened in that case. *McBride* was the attorney, sued for fees and the defense was that you breached your contract, therefore, you're not entitled to a contingent fee. The case went to a jury trial. That's what should have happened in this case.

* * *

[p. 16] MR. HAMMES: Yes, If I might respond. First of all, the motion that brings us here today is Mr.

Barr's motion to enforces [sic] Mr. Barr's motion, not Aiken, Scoptur's motion. Okay, the only motion that I got was a motion filed by Mr. Barr, and he questions as to why I'm here – is because he sent me the motion, all right, and the motion which he filed with the Court, he asked for an order allocating attorney fees and expenses among the counsel of record. Now, they're saying that you don't – they don't want you to do that, they don't want you to allocate, but that's the motion that brought us here today, No. 1.

No. 2, let's use Mr. Aiken's analogy of the lien, construction lien. Apparently, Mr. Aiken either misspoke or isn't familiar with the procedure involved in the liens. If you – If using his example, a contractor provides labor and materials to improve a home, the contractor's not paid, the contractor has a right to put a lien on the property by filing the statutory procedure. Putting a lien on the property doesn't guarantee anything. What happens then is if [p. 17] they want to enforce that lien, they must then bring a cause of action proving that they had a contract and that they performed the services, and then the property owner can present a defense that no, you didn't do the work the way you were supposed to do the work, okay, and the court has a jury trial on whether there was a contract and whether or not they're entitled to recover, and if so, how much the lien is, simply a warranty to guarantee if and when they are on their contract action, the money's there to pay for.

That's not what we're – We're not disputing the fact that there were contracts and liens on them. The contract also says, Mr. Barr's in particular, says that if he doesn't get paid on the one-third, I guess paid on an hourly basis

of $130 an hour, if he doesn't get paid on the one-third contingent fee contract, so the issue that has to be decided by the Court is whether or not they performed their contract as they said they would do so. If they did, then the allocation of that money as between the attorneys can be undertaken, but this is a contract case, pure and simple, to start with.

THE COURT: All right. The Court will take a brief adjournment in this matter. I'll be back shortly. Thank you.

(Whereupon, a recess is taken at this time.)

[p. 18] THE COURT: Please be seated. The Court will recall Case No. 93-CV-1321. Mr. Zick, Mr. Morters, Mr. Hammes, Mr. Aiken, and Mr. Barr are present in court. The issue that is in front of the Court is actually the scope of this particular hearing. The Court has reviewed the case of *McBride vs. Wausau Insurance Company* at 176 Wis.2d 382, and most specifically, Pages 388, 389, and 390. After reviewing that case and considering the positions taken by the parties, the Court believes that, as was stated by Mr. Aiken, that the scope of this hearing should be dealing with exclusively, I believe, the enforcement of the actual retainer agreements that were involved in this particular case. I disagree with Mr. Hammes's position that Mr. Morters has a right to have a jury make a determination as to whether the retainer agreements were breached by the actions of Mr. Aiken and also by Mr. Barr.

The Court believes in light of my inquiry of Mr. Hammes as to whether his client was objecting to who was receiving – Strike that. I had posed a question earlier

to Mr. Hammes as to whether his client was objecting to someone receiving the one-third, whether he was staking a claim to that one-third settlement proceeds, and the answer to that was Mr. Morters was not [p. 19] objecting to that, but rather, all he was stating is that he believed that Mr. Zick apparently was entitled to more of those fees as opposed to Mr. Aiken and Mr. Barr.

The way the Court analyzes this is that Mr. Morters at best has or could be called as a witness under the underlying claim of the enforcement of the attorney fee liens, but he really has no other standing to object because it is clear that the one-third fees that are in dispute are not his monies. They are the monies either belonging to Mr. Zick, Mr. Aiken, or to Mr. Barr, either totally or in some portions thereon; so therefore, the Court concludes that it has jurisdiction to act in this particular case and that the scope of this particular hearing will exclusively relate to the enforcement of these attorney fee liens and whether there existed breaches of those particular retainer agreements, so with that in mind, we will proceed.

Mr. Barr, you had filed a motion, so I'll let you proceed.

* * *

[p. 20] THE COURT: Well, I think the main issue that the Court is going to have to address is whether or not there was cause for termination of you, if it did even occur Mr. Barr, and to that end, I believe that Mr. Aiken can cross or can examine you, Mr. Hammes, and likewise, so can Mr. Zick; so with that in mind, I

would like to have you come up to the witness stand then, and we can proceed accordingly.

Mr. Aiken, do you want to start off first?

* * *